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IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

No. 752

POLAKOW'S REALTY EXPERTS, INC.,
Petitioner,

v.

THE STATE OF ALABAMA,
Respondent.

No. 753

P. S. STRUMPF,
Petitioner,

v.

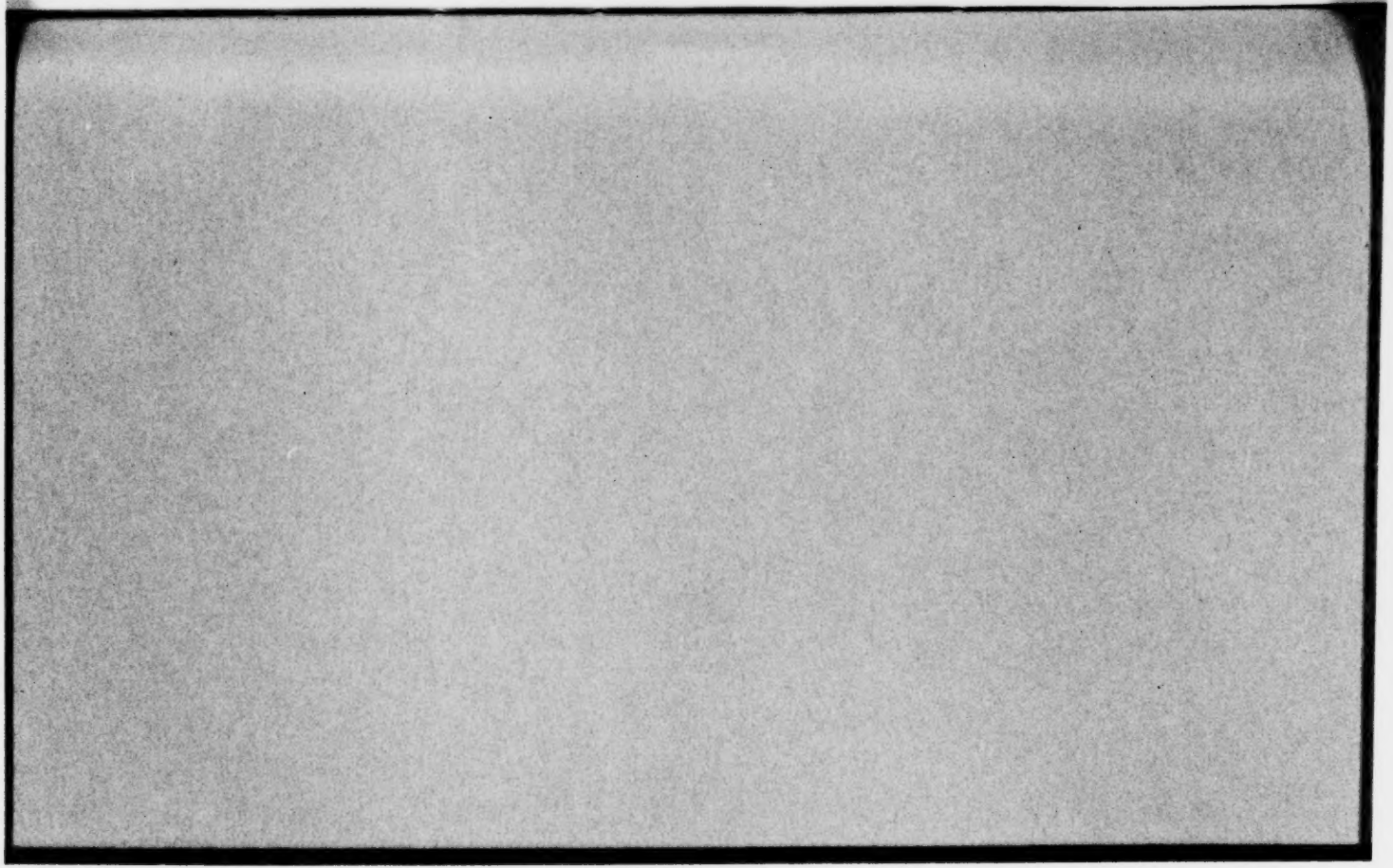
THE STATE OF ALABAMA,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

BRIEF FOR RESPONDENT

WILLIAM N. McQUEEN,
Acting Attorney General
Counsel for Respondent.

GEORGE C. HAWKINS,
Assistant Attorney General,
On the Brief.



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I

OPINION OF THE COURT BELOW

The opinion of the Supreme Court of Alabama, which is here under consideration, is reported as follows: State of Alabama v. P. S. Strumpf and State of Alabama v. Polakow's Realty Experts, Inc., 10 So. 2nd 461, both cases being decided in one opinion.

II

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this court to review the judgment of the Supreme Court of Alabama rendered on the 22nd day of October, 1942, rehearing denied November 19, 1942. Petitioner relies upon Section 237, subsection (a) and (b) of the United States Judicial Code, as amended on February 13, 1935, (U.S.C.A. Title 28, Section 344), as giving this court jurisdiction.

POINTS RELIED UPON BY PETITIONERS

The points relied upon by petitioners as grounds for relief are as follows:

That the Supreme Court of Alabama in deciding that the Alabama Real Estate Law, Chapter 14 of Title 46 and Section 298 of said Chapter 14, Alabama Code 1940, was not violative of the Fourteenth Amendment to the Constitution of the United States decided an important question of Federal Law which was probably in conflict with this Court's decisions.

That the Writ should be allowed because two of the seven Justices of the Supreme Court of Alabama dissented.

That the case of *Bratton v. Chandler*, 260 U. S. 110, did not decide the validity of a real estate act, but only dealt with the power of the commission created by said act.

III

STATEMENT OF THE CASE

Polakow's Realty Experts, Inc., and P. S. Strumpf were separately indicted in the Circuit Court of Jefferson County, Alabama, Bessemer Division, for engaging in the business of real estate salesman or broker without having first procured a license from the Alabama Real Estate Commission, in violation of the Alabama Real Estate Law set forth in Chapter 14, Sections 298 to 311, inclusive, Title 46, Code of Alabama 1940. To this indictment the defendants filed demurrers attacking the constitutionality of said Law. The Circuit Court sustained these demurrers, and the State appealed to the Supreme Court of Alabama as it had a right to do by statute. The Supreme Court of Alabama, holding that it was a valid exercise of police power for the State to require a license and authorize the real Estate Commission to grant such license "only to persons who are trustworthy and competent to transact the business of a real estate broker or real estate salesman in such manner as to safeguard the interests of the public," reversed the decision of the Circuit Court and remanded the case for new trial.

As will appear from the record only these pleadings have been ruled upon, the merits of the case having not yet been tried nor the defendants convicted under the Law in question.

PROPOSITIONS OF LAW

PROPOSITION I

On appeal or certiorari the jurisdiction of the Supreme Court of the United States to review the decisions of the highest court of a state extends only to final judgments or decrees.

Section 344, *U.S.C.A.* (Judicial Code, Section 237, amended) subsections (a) and (b)

Hughes', Federal Practice, Sections 3188, 3337

Federal Digest, Certiorari Key No. 16, Courts Key No. 393

Patterson v. United States, 15 U. S. 221, 2 Wheat. 221

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PROPOSITION II

When the highest court of a state reverses the judgment of a lower court and remands the case for a new trial on its merits, or when there has only been an adjudication of the pleadings, and not the merits, of a case, there is not such a final judgment as to give the Supreme Court of the United States jurisdiction on appeal or certiorari.

Rankin v. State, 78 U.S. 380, 11 Wall. 380

St. Clair County v. Lovingston, 85 U.S. 628, 18 Wall. 628

McComb v. Commissioners of Knox County, 91 U.S. 1

Bostwick v. Brinkerhoff, 106 U.S. 3

Grant v. Pheonix Ins. Co., 106 U.S. 429

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Heir of DeArmas v. United States, 47 U.S. 103, 6 Howard 103

Meagher v. Minn. Thresher Mfg. Co., 145 U.S. 608

Missouri & Kansas Ry. Co. v. Olathe, 222 U.S. 185

Indiana ex rel Anderson v. Brand, 303 U.S. 95

PROPOSITION III

A final judgment in a criminal case for the purpose of review by the Supreme Court of the United States contemplates a trial upon the merits followed by a judgment of conviction.

Rankin v. Tennessee, 78 U.S. 380, 11 Wall. 380

Heike v. United States, 217 U.S. 423

Miller v. Aderhold, 288 U.S. 206

Hill v. Wampler, 298 U.S. 460

Pratt v. United States, 102 Fed. 2nd 275

Berman v. United States, 302 U.S. 211

PROPOSITION IV

The Supreme Court of the United States, as well as the other courts of the land, has held that a State legislature, exercising its broad discretion in determining whether an occupation shall be regulated by excluding the dishonest or incompetent, may under its police power require a license of a real estate broker.

Roman v. Loeb, 243 N.Y. 51, 50 A.L.R. 1329

Annotation 50 A.L.R. 1334

Bratton v. Chandler, 260 U.S. 110

Riley v. Chambers, 181 Cal. 589, 8 A.L.R. 418

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La Tourette v. McMaster, 248 U.S. 465

People ex rel Durham Realty Corporation v. La Fetra, 230 N. Y. 429, 16 A.L.R. 152

Gundling v. Chicago, 177 U.S. 183

Great Atlantic & Pacific Tea Company v. Grosjean, 301 U.S. 412

Schmidinger v. Chicago, 226 U.S. 578

Nebbia v. N. Y., 291 U.S. 502

Bradley v. Richmond, 227 U.S. 477

Brazee v. Michigan, 241 U.S. 340

Hall v. Geiger-Jones Company, 242 U.S. 539.

ARGUMENT

I

THERE BEING NO TRIAL OF THE MERITS IN THESE CASES LEADING TO A JUDGMENT OF CONVICTION UNDER THE ALLEGEDLY UNCONSTITUTIONAL STATUTE, BUT ONLY A JUDGMENT OF THE SUPREME COURT OF ALABAMA ON THE PLEADINGS, I.E., INDICTMENT AND DEMURRER, REVERSING AND REMANDING FOR NEW TRIAL, THERE IS NO FINAL JUDGMENT UPON WHICH TO INVOKE THE JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES.

It is the contention of the State of Alabama, the Respondent, that the jurisdiction of the Supreme Court of the United States to review the decision of the Supreme Court of Alabama in these cases is prematurely invoked for that the said decision is not a final judgment, as such is defined by the numerous opinions that have been handed down by this Honorable Court.

The Supreme Court of Alabama held that the trial court erred in sustaining the demurrer to the indictment, and rendered a judgment reversing the cases and remanding them for a new trial. In the lower court, as the record will show, there was never

a trial of the cases on the merits, the petitioners (defendants in the trial court) were never adjudged guilty, sentence has never been passed, and there has been no judgment of conviction.

The State offers to show to this Honorable Court that the decision of the trial court was not final in that the cases were reversed and remanded for a new trial; there has been no trial on the merits, but only on the pleadings, i.e., the indictment and demurrer; and the petitioners have never been convicted and sentenced under the State statute which has allegedly denied them their constitutional right of due process.

A. NECESSITY FOR A FINAL JUDGMENT

Section 344, U.S.C.A. (Judicial Code, Section 237, amended) Subsections (a) and (b), the statute under which the petitioners have requested the issuance of a writ of certiorari, providing that the Supreme Court of the United States may review the decisions of the highest court of a state under certain circumstances, expressly limits such reviewable decisions to final judgment or decrees.

Despite the several revisions of the above cited statute this Court has consistently construed that its jurisdiction will not extend to review the decision of the highest court of the state unless the said decision constitutes a final judgment.

Although prior to that time the same conclusions had been reached, as evidenced in the several cases cited under proposition of Law Number I, perhaps one of the outstanding earlier cases is that of *McLish v. Roff*, 141 U. S. 661, in which Mr. Justice Lamar, in holding that a final judgment was prerequisite to invocation of the jurisdiction of the Supreme Court of the United States, stated as follows:

> "From the very foundation of our judicial system the object and policy of the acts of Congress in relation to appeals and writs of error have been to save the expense and delays of repeated appeals in the same unit, and to have the whole case and every matter in controversy in it decided in a single appeal."

This same rule of law has been expressly laid down in many other cases, among which are *Louisiana Navigation Company v. Oyster Commission*, 226 U.S. 99, and *Collins v. Miller*, 252 U.S. 364; the latter of which held that "a case may not be brought by appeal or writ of error in fragments. To be appealable the judgment must be not only final, but complete."

Therefore, it being seen that the jurisdiction of the Supreme Court of the United States to review decisions of the highest court of a state extends only to final judgments, the forthcoming paragraphs are

designed to summarize those legal constructions of the term "final judgments" applicable to the cases at bar.

B. WHEN THE HIGHEST COURT OF A STATE REVERSES AND REMANDS A CASE FOR A NEW TRIAL, THE JUDGMENT IS NOT FINAL.

In regard to the State's contention that a judgment of reversal, remanding the case for a new trial, is not a final judgment, reference is made to the case of *St. Clair County v. Lovingston*, 85 U.S. 628, and 18 Wall. 628, in which the question was resolved as follows:

> "The judgment of the Supreme Court of the State (reversing and remanding the case for a new trial) cannot be regarded as a final judgment in the sense in which the term was used in the judiciary acts. No judgment is final which does not terminate the litigation between the parties to the suit. The issue between the parties may be again tried in the Circuit Court, and another judgment may be recovered, which may be removed to the Supreme Court for revision. Consequently, then, there has been no final determination of the case."

This same conclusion was reached in the case of *Morgan v. Thompson*, 124 Fed. 203, in which there is cited numerous opinions of this Honorable Court.

Mr. Chief Justice White in the case of *Bruce v. Tobin*, 245 U.S. 18, stated that although the judgment of the state court determined the ultimate issue involved, the finality contemplated by the statute was to be determined from the record and the character of the judgment rendered; and the fact that the case was remanded for a new trial precluded all conception of finality for the purpose of review by the Supreme Court of the United States. Reference is also made to *Smith v. Adams*, 130 U.S. 167, *Cincinnati Street Railway Company v. Snell*, 179 U.S. 395, and *Arnold v. Guimarin and Company*, 263 U.S. 427. One of the latest cases concerning this question is that of *Laclede Gas Company v. Public Service Commission*, 304 U.S. 398, in which the Supreme Court of the United States further holds that the reviewable judgment must be final.

A study of these cases reveals that the universally accepted definition of "final judgment" contemplates that such judgment has disposed of the entire case on its merits, directed the judgment which should be entered, and has left nothing to the judicial discretion of the trial court. Reference to the above cited case shows that this rule is applicable both to appeal and certiorari. In the cases at bar the Supreme Court of Alabama reversed and remanded them for a new trial. Not until such new trial takes place will the merits of the case be introduced and decided upon. The State earnestly submits that it necessarily follows, both from logic and precedent, that the judgment of the Supreme Court of Alabama

is not final, and, therefore, not reviewable by this Court.

C. WHEN THERE HAS BEEN NO TRIAL ON THE MERITS OF A CASE, BUT ONLY A DECISION ON THE PLEADINGS, THERE IS NO FINAL JUDGMENT.

It is further contended by the State that inasmuch as only the pleadings were decided upon, and the merits of the case still remain to be tried, the judgment of the Supreme Court of Alabama is not final and is not reviewable by this court. Numerous cases have held that when appeal or certiorari is taken to this Court to review the judgment of state courts on questions of pleadings, such an appeal or certiorari would not lie because the jurisdiction of this court had been prematurely invoked. This question was ably settled by Mr. Chief Justice Taney in the case of *Heirs of DeArmas v. United States*, 47 U.S. 103, 6 Howard 103, in which it was held that an order sustaining a demurrer, being only a question of pleading, was not a final judgment. The leading case of *Bostwick v. Brinkerhoff*, 106 U. S. 3, held that the judgment of the Court of Appeals of New York holding the lower court in error for sustaining a demurrer was not a final judgment because, even though it had been decided that the suit could be maintained, still the litigation had not been terminated and the defendant had not been adjudged guilty of the negligence complained of. This case is directly in point with the cases at bar and the State

submits that such authority conclusively precludes the petitioners from invoking the jurisdiction of this court at this stage of the proceedings. That a judgment on a demurrer, leaving the merits of the case to be determined in a future proceeding, is not a final judgment reviewable by this court, reference is made to the cases of *Meagher v. Minn. Thresher Mfg. Co.*, 145 U.S. 608, *Missouri and Kansas Railway Company v. Olathe*, 222 U. S. 185, and *Indiana ex rel Anderson v. Brand*, 303 U. S. 95.

D. FINAL JUDGMENT IN A CRIMINAL CASE CONTEMPLATES A TRIAL ON THE MERITS FOLLOWED BY A SENTENCE OR JUDGMENT OF CONVICTION.

Reference is here made to a number of criminal cases in which this Honorable Court has consistently held that before the judgment is final for the purpose of review in the Supreme Court of the United States, it is necessary that there be a trial upon the merits of the case followed by a verdict of guilty and a judgment of conviction. Perhaps, one of the earliest cases setting this precedent is that of *Rankin v. Tenn.* 78 U.S. 380, 11 Wall. 380. Mr. Justice Day in the case of *Heike v. United States*, 217 U.S. 423, holding that a decision on the pleadings in a criminal case did not constitute a final judgment, stated as follows:

> "The thing litigated in this case is the right to convict the accused of the crime charged in the indictment. Certainly that issue has not

been disposed of, much less has a final order been made concerning it, leaving nothing but an execution of it yet undone. * * * As the case now stands, upon the plea of not guilty, upon which the issue raised must be tried to a jury, certainly the whole matter has not been disposed of. But maybe that upon trial the defendant would be acquitted on the merits. It may happen that for some reason the trial will never take place. In either of these events there can be no conclusive judgment against the defendant in the case."

The case of *Miller v. Aderhold* 288 U.S. 206, held that in a criminal case final judgment means sentence, and a void order purporting to suspend the sentence was neither final nor a valid judgment. The case of *Hill v. Wampler*, 298 U.S. 460, held that "the only sentence known to law is the sentence or judgment entered upon the records of the Court," and that where the sentence or judgment was not so entered there was no final judgment. These two questions are ably treated with the same results in the case of *Pratt v. United States*, 102 Fed. 2nd, 275.

Mr. Chief Justice Hughes in the case of *Berman v. United States*, 302 U.S. 211, briefly decided the question involved in the cases at bar in the following statement:

"The final judgment in a criminal case means sentence. The sentence is the judgment. * * * In criminal cases, as well as civil, the

judgment is final for the purpose of appeal when it terminates the litigation on the merits and leaves nothing to be done but to enforce by execution what has been determined."

The State submits that the foregoing case conclusively decides the cases at bar. Here, there has been only a decision on the pleadings, the merits have not been tried, nor has there been a judgment of conviction. The petitioners insist that there has been a violation of their constitutional right of due process of law. The State submits that at this stage of the proceeding the petitioners cannot be heard to say that their constitutional rights have been violated; rather, before the jurisdiction of this Court can be invoked, there must be a trial on the merits followed by a judgment of conviction under the statute by which the petitioners are allegedly denied due process of law. If the petitioners were not convicted but were acquitted there would be no basis for attacking the constitutionality of the statute. The State earnestly contends that the same would apply when petitioners seek to attack the constitutionality of the statute even before they are convicted thereunder.

II

THERE IS HERE PRESENTED NO FEDERAL QUESTION ON WHICH THE SUPREME COURT OF THE UNITED STATES HAS NOT HERETOFORE PASSED: THE NUMEROUS DECISIONS UPHOLD A STATE'S RIGHT UNDER ITS POLICE POWER TO REASONABLY AND UNARBITRARILY REGULATE AN OCCUPATION, AND, IN PARTICULAR, THAT OF REAL ESTATE BROKER.

The State respectfully submits that if the case of *Munn v. Illinois*, 94 U.S. 113, were the law today, the petitioners' argument that the occupation of real estate broker, being harmless and innocuous, is not subject to State regulation would be tenable. However, this Honorable Court has long since ruled that a business, to be regulated by the State, need not be "affected with a public interest," rather this Court will only determine whether the regulatory statute is "unreasonable, arbitrary and capricious."

The State earnestly contends that the cases at bar present no question on which the law is unsettled. That a State by the requirement of a license and a test of competency can regulate the occupation of real estate broker has been affirmatively decided expressly and inferentially by this Court and other courts of the land. The Alabama statute in question permits no arbitrary exclusion, rather it reasonably provides that "licenses shall be granted only to per-

sons who are trustworthy and competent to transact the business of a real estate broker or real estate salesman in such manner as to safeguard the interests of the public * * *."

Mr. Justice Cardozo, in the case of *Roman v. Loeb*, 243 N. Y. 51, 50 A.L.R. 1329, has perhaps rendered the most complete opinion on this point. Holding that the position of real estate broker is one of trust and confidence, he stated that for the protection of the public from possible collusion and fraud, a state, under its police power, could require a license and subject the real estate broker to an examination of competency. Despite the argument of petitioners that the case of *Bratton v. Chandler*, 260 U. S. 110, did not decide upon the constitutionality of a statute regulating real estate brokers, the State contends that, quoting from Mr. Justice Cardozo's foregoing opinion, "By diction and manifest implication, if not necessary decision, the statute was sustained." Although, in the Bratton case the principle issue was to determine the validity of the method by which the real estate commission procured evidence of competency, a close examination of the case reveals that the Supreme Court of the United States considered the regulatory statute a valid exercise of the state's police power. For a summary of the numerous State cases upholding similar statutes, reference is made to the annotation found in 50 A.L.R. 1334. These cases unanimously hold that the position of real estate broker, being one of trust and confidence, and a fiduciary relationship, is subject to

regulation. The case of *Bradley v. Richmond*, 227 U. S. 477, held that a city ordinance requiring license of real estate agents, bankers, etc., not being arbitrary or unreasonable, was a valid exercise of police power.

Among other professions which have been held subject to state regulation are that of selling cigarettes (*Gundling v. Chicago*, 177 U.S. 183), selling milk (*Nebbia v. N. Y.*, 291 U.S. 502), selling loaves of bread (*Schmidinger v. Chicago*, 226 U.S. 578).

The cases cited in the foregoing paragraph held that there is no principle limiting such regulation to businesses affected with a public interest; rather the only test is whether such regulation is unreasonable, arbitrary or capricious.

The case of *Gundling v. Chicago*, supra, concerned an ordinance requiring a license for the sale of cigarettes, said license to be issued by the Mayor if he were satisfied that applicant was of good character and reputation, and suitable to engage in such business. The court held that this statute was not discriminatory or arbitrary, and that it was a valid exercise of police power. The State wishes to emphasize the similarity between this case and the cases at bar. Mr. Justice Roberts in the case of *Nebbia v. N. Y.*, supra, in a thorough treatment of the subject, summarizes the law as follows:

"If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary or discriminatory, the requirements of due process are satisfied."

With reference to the cases relied upon by petitioners, the State wishes to call to the Court's attention that *Truax v. Raich*, 239 U.S. 33 was decided solely upon the ground that the state statute discriminated in favor of its own citizens and against non-residents; and that the cases of *Wolff Company v. Industrial Court*, 262 U.S. 522, *Ribnik v. McBride*, 277 U.S. 350, and *New State Ice Company v. Liebmann*, 285 U.S. 262, tended to cling to the rule laid down in *Munn v. Illinois*, supra, which required that a business to be regulated be affected with a public interest. However, in the two latter cases it is significant to note that the dissenting opinions of Mr. Justices Stone, Holmes and Brandeis evidenced the trend of legal thought which now stands as the accepted law. These dissenting opinions discarded the requirement that the business be clothed with a public interest, requiring only that the statute be not unreasonable or arbitrary.

From the foregoing it would appear that the case at bar presents no question not heretofore decided by this Honorable Court. Not only has it been conclusively decided that the occupation of real estate broker, being one of trust and confidence, can be regulated by a state; but, also, the above cited cases include many "harmless and innocuous" occupations

which can be regulated under a state's police power as long as such regulation is not unreasonable or arbitrary.

CONCLUSION

For the reasons set forth hereinabove the State respectfully submits that the petitions for writ of certiorari should not be allowed, first, because there is no final judgment upon which can be based appeal or certiorari to the Supreme Court of the United States, and second, because this Court, as well as other courts of the land, has consistently held that the occupation of real estate broker, together with many analogous occupations, is subject to regulation by the State under its police power, such regulation effected by the requirement of a license and a test of competency.

The State earnestly requests that these petitions for writ of certiorari be denied; or, in the alternative, that the judgment of the Supreme Court of Alabama be affirmed.

Respectfully submitted,
WILLIAM N. McQUEEN,
Acting Attorney General
Counsel for Respondent.

GEORGE C. HAWKINS,
Assistant Attorney General,
On the Brief.

CERTIFICATE OF SERVICE

I hereby certify that I have forwarded a copy of the foregoing Brief to Hon. Horace C. Wilkinson, Attorney for Petitioners, on this the 6th day of April, 1943.

WILLIAM N. McQUEEN,
Acting Attorney General
Counsel for Respondent.